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PETITION FOR CERTIORARI

IN THE

Supreme Court of the United States

October Term, 1973

No. A-521

JAMES JEROME ASTALOS and
WILLIAM DALLAS BERMEL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on the 8th day of November, 1973.

Citations to Opinion Below

The opinion of the Circuit Court of Appeals, is printed in Appendix B hereto, *infra*, p. 13.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on November 8, 1973, printed in Appendix B hereto, *infra*, p. 13. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1). An extension of time to file Petition for Writ of Certiorari was granted by Associate Justice of the Supreme Court, Thurgood Marshall, extending same to and including January 7, 1974, printed in Appendix C hereto, *infra*, p. 27.

Questions Presented

Where the owner of goods is also the carrier and uses its own drivers and tractor-trailers, does the interstate shipment begin when the goods physically leave the owner's premises?

Where the owner of goods is also the carrier and the goods never leave the owner's premises, is intent to ship the goods in interstate commerce sufficient basis for finding an interstate shipment?

Is an interstate shipment completed when an owner, using its own driver and tractor-trailer, has the goods delivered to its premises and the bill of lading deposited?

Was the United States Court of Appeals for the Second Circuit correct in stating that in the enactment of Title 18, § 659, United States Code, the Congress ". . . intended that a theft from commerce could be committed before the goods were placed on board, and after they are taken off of a carrier; . . ."?

Is that portion of Title 18, § 659, United States Code which reads ". . . moving as or which are a part of or which constitute an interstate or foreign shipment of freight . . ." conjunctive rather than disjunctive?

Statement

Petitioners and two co-defendants were indicted by a Federal Grand Jury in the Western District of New York, and charged in three counts with a violation of Title 18, United States Code, Section 659 and 2; while a fourth count charged a conspiracy between May 1, 1972, and July 22, 1972, to commit offenses against the United States by stealing, unlawfully taking and carrying away tractors and trailers containing goods and chattels in excess of $100.00 from the parking lot of Middle Atlantic Warehouse Distributors, Inc., in Tonawanda, New York, which goods and chattels were moving in interstate commerce.

Counts I and II alleged that on July 22, 1972, the defendants stole and carried away Trailers 7105 and 7106 from the Middle Atlantic Warehouse Distributors, Inc., Tonawanda, New York, which contained goods in excess of $100.00 which were moving as, were a part of, and constituted an interstate shipment of freight from Tonawanda, New York, to various places in Massachusetts, Connecticut, Rhode Island and Pennsylvania.

Count III charged that on July 22, 1972, the defendants stole and carried away a trailer owned by Middle Atlantic Distributors, Inc., containing goods and chattels of a value in excess of $100.00 which were moving as, were a part of, and constituted an interstate shipment from Toledo, Ohio, to Tonawanda, New York.

Trial was held at a term of the United States District Court for the Western District of New York. On March 20, 1973, the Jury rendered its verdict finding the Petitioners guilty on all four counts. The Court reserved decision on a motion to set aside the verdict and denied same on April 9, 1973.

On April 16, 1973, judgment of conviction was entered and Petitioner ASTALOS was sentenced to eight (8) years imprisonment on Counts I, II and III, sentences to run concurrently. On Count IV, he was sentenced to five (5) years to run concurrently with the other imprisonment imposed and he was fined $20,000.00.

On the same date judgment of conviction was entered against Petitioner, BERMEL, who was sentenced to five (5) years imprisonment on each Count, those sentences to be served concurrently and he likewise was fined $20,000.00.

Judgment was affirmed by the United States Circuit Court of Appeals for the Second Circuit.

Petitioners contend that when two of the tractor-trailers involved were taken they had not yet begun to move in interstate commerce.

They further take the position that the third tractor-trailer of concern here had terminated any movement in interstate commerce.

Middle Atlantic Warehouse Distributors, Inc., is a wholesaler of automotive parts with a warehouse in Tonawanda, New York. It owns its own tractor-trailers and employs its drivers who pick up automobile supplies from various manufacturers which are taken to the Tonawanda warehouse for storage and later shipment to customers.

On July 21, 1972, from the warehouse in Tonawanda, (Tr. 124), certain merchandise was loaded on Trailer 7106 (Tr. 427). The trailer which was to leave on July 24, 1972, was sealed and bills of lading were prepared (Tr. 124).

From the date it was loaded and up to and including July 22, 1972, this trailer did not leave the possession of or custody of Middle Atlantic, nor was any delivery of contents undertaken (Tr. 478).

In similar manner Trailer 7105 was loaded on July 20, 1972 (Tr. 476). From that date to July 22, 1972, such trailer never left the premises of Middle Atlantic and remained under its control (Tr. 477). This trailer which was scheduled to leave July 23, 1972 (Tr. 477), never left the possession or custody of the corporation (Tr. 478), and like Trailer 7106, no delivery of contents had been undertaken between July 20, 1972 and July 22, 1972 (Tr. 478).

A third Trailer 7107, owned by Middle Atlantic was loaded in Toledo, Ohio with one of its employees then transporting it on July 21, 1972 to the Tonawanda warehouse. When he arrived there he backed the trailer into door No. 6 of the warehouse and placed the bill of lading and packing list in the mail box (Tr. 149-158). When he did so the delivery of the merchandise in the trailer was at an end as far as his job was concerned (Tr. 162), his duty was complete and the journey ended as to that particular load. Trailer 7107 was then in the possession of Middle Atlantic Warehouse Distributors, Inc. (Tr. 166-167).

James M. Gilmore, a paid informer for the Federal Bureau of Investigation (Tr. 559), testified that on July 21, 1972 (Tr. 564), he along with defendants Pries and Edin, went to the Middle Atlantic premises where they entered the trucks that were coupled with trailers; got the running lights on; gave air pressure build up for brakes, and then drove the three tractors with Trailers 7105, 7106 and 7107 attached from the Company parking lot (Tr. 525-527).

Petitioners claim that Trailers 7105 and 7106 had not yet become interstate shipments at the time they were stolen, and that Trailer 7107 had ceased to be an interstate shipment by the time it was stolen.

Reasons For Granting The Writ

1. The opinion of the court below set forth the following:

> "We are told that this is a case of first impression. Perhaps this is so."

and later stated:

> "If it be true that the situation before us in this case is a novel one and that the state of the authorities is such as to leave a loophole through which thieves may safely emerge unscathed and unaffected by any Federal criminal statute to the frustration of the obvious purpose of the Congress in the enactment of Section 659 to facilitate rather than to impede the movement of goods in interstate commerce, it is high time that the loophole be closed."

It is clear that the United States Court of Appeals for the Second Circuit was disturbed by the question of when interstate commerce began and terminated in this Section 659 prosecution, particularly where the carrier is also the owner of the goods involved, which in two instances were stolen before leaving the carrier-owners premises, and in a third instance are stolen from the carrier-owners warehouse dock after having been finally delivered there.

The other question which should be resolved is that portion of the statutory language in Section 659, "moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property"; the intent of Congress in the enactment of that statute; and whether the quoted portion should be given conjunctive rather than disjunctive effect.

After a review of the legislative history of Section 659, the court below concluded that it "sheds no light on its purpose. . . ." and then based upon the concept of pro-

moting the flow of goods in interstate commerce fashioned an intent." It was intended that a theft from commerce could be committed before the goods were placed on board, and after they are taken off of a carrier, it is not required that a shipment be in motion."

In doing so reliance was placed on *United States v. Berger*, 338 F. 2d 485 (2d Cir. 1964), *Cert. denied*, 380 U.S. 923 (1965); and *United States v. Thomas*, 396 F. 2d 310 (2d Cir. 1968).

Petitioners admit that *motion* is not the test, but argue that "moving as or which are a part of an interstate shipment" are the criteria to be applied. Application of the factual backdrop in the instant case leaves the statutory litmus unaffected.

Petitioners further urge that reliance on *United States v. Berger, supra*, 338 F. 2d 485, *Cert. Denied*, 380 U.S. 923; and *United States v. Thomas, supra*, 396 F. 2d 310, is misplaced, since these both represent moving cases.

In *Berger, supra*, the contention of the defendants that the car had *not* begun its interstate journey at the time of the theft was rejected by the Second Circuit with the statement at page 487:

> "These facts are enough to mark the beginning of the interstate journey from the moment the car left the premises of the shipper."

Likewise in *Thomas, supra*, the goods were still in transit. There cartons of chinaware were shipped from Japan to New York for delivery outside the State. The importer's agent took the cartons from a Brooklyn pier to a warehouse where before being unloaded some of them were stolen.

This is not the same situation where the goods never leave the premises of the owner-carrier or goods are delivered to the owner-carrier's premises that being their destination.

Another movement case and one cited below relative to affording the statute disjunctive rather than conjunctive application was *United States v. Gollin*, 166 F. 2d 123 (3d Cir.), *Cert. Denied*, 333 U.S. 875 (1948), second appeal *United States v. Gollin*, 176 F. 2d 889 (3d Cir.), *Cert. Denied*, 338 U.S. 848 (1949). There beer had been loaded on a truck and driven onto a public street to the front of the brewery garage about two blocks from the loading platform. The truck and contents were taken from there. It is true that by a divided Court, its thinking was expressed that the beer involved constituted an interstate shipment. Its segregation as such a shipment had been completed. However, the main thrust of the determination was based on the Court's expression at page 894:

> "We are of the opinion that there is ample testimony in the record of the second trial (as there was in the record of the first) to support the conclusion that a transfer or movement in interstate commerce had actually been begun before the theft took place."

Contrary to the argument of Respondent here this indicates that the Court's decision was based on "moving as or which are a part of" as provided in the statute.

The court below took the position that its result was controlled by *United States v. Vilhotti*, 452 F. 2d 1186 (2d Cir. 1971), *Cert. Denied*, 406 U.S. 947 (1972), where the defendants were charged with buying, receiving or having in their possession chattels stolen from an interstate shipment. In that case there was a carrier other than the owner of the goods. Trailers were loaded and packed and left for the

carriers tractors and drivers to transport them from New Jersey to New York. The owners activities with the goods in question had terminated and the theft took place before the carriers tractors arrived.

At the bottom of page 1187 was set forth footnote 1, as follows:

> "1. This constituted an effective delivery of the goods to the carrier, sufficient to render the goods part of interstate commerce as required by the statute. *United States v. Gollin*, 166 F. 2d 123 (3d Cir. 1947), *Cert. Denied*, 333 U.S. 875, 68 S.Ct. 905, 92 L. Ed. 1151 (1948); see *United States v. Berger*, 338 F. 2d 485 (2d Cir. 1964), *Cert. Denied*, 380 U.S. 923, 85 S.Ct. 925, 13 L. Ed. 2d 809 (1965); *United States v. Cousins*, 427 F. 2d 382, 385 (9th Cir. 1970)."

A thorough reading of such excerpt and footnote 1 indicates that the same was not and should not be determinative that the loading of the trailers awaiting the carriers tractors scheduled to take them from New Jersey to New York was similar to the instant no carrier situation. Here there was no proof whatsoever that the trailers left the shipper's premises or that anyone received or was to receive them to carry out the interstate journey. Trailers 7105 and 7106 were clearly still in the possession and under the control of the owner shipper as was Trailer 7107. None of these trailers were moving as or which are a part of or which constitute an interstate shipment as required by the statute.

The question of when interstate commerce begins and terminates sufficient to trigger the applicability of Section 659 has been a troublesome one to say the least and has been in dispute and must remain so until settled by the Supreme Court.

The further question presented here as to what activities constitute interstate commerce where the carrier is the owner of the goods, is, it is believed, one of first impression and such determination should be rendered authoritatively at the highest appellate level in order to resolve this issue.

2. Clearly, the question presented as to whether the language of Section 659 must be given conjunctive rather than disjunctive application is of importance in the administration of the Federal criminal laws. As heretofore pointed out the uncertainty of the court below in the situation here presented and the need for clarification and possibly legislation become obvious by the court's own admission and language that:

> "If it be true that the situation before us in this case is a novel one and that that state of the authorities is such as to leave a loophole through which thieves may safely emerge unscathed and unaffected by any Federal criminal statue, ... it is high time that the loophole be closed."

That statement more than sufficiently indicates the importance and need for the review now requested.

Settlement of the questions presented, by this Court, is plainly in the public interest, since it is likely to be presented in almost every Section 659 prosecution, including these now pending, and concerns the question of jurisdiction for criminal prosecutorial purposes between the United States authorities and those of the various States.

3. The decision of the court below is believed to be erroneous. Moreover, the decision below probably conflicts with applicable decisions of this Court.

In 1918, the Supreme Court in *Hammer v. Dagenhart*, 247 U.S. 251, was confronted with the constitutionality of a bill to prevent interstate commerce on the products

of child labor. In determining when interstate commerce begins, the Court quoted with approval the statement of Justice Jackson, *In Re Greene*, (C.C.) 52 Fed. 113 at page 531 (S.Ct. ed.) as follows:

> ". . . . . When the commerce begins is determined, not by the characters of the commodity, nor by the intention of the owner to transfer to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state."

The congressional intent in the enactment of Section 659 was inferred by the court below on the broad theory of promoting the flow of goods in interstate commerce.

If Congress had wished to change pre-existing law to the interpretation now given, it would have done so by specific enactment and in clear and unmistakeable terms. That this has not been done is evident by the statement in the opinion below, "it is high time that the loophole be closed."

Further, relief of that nature is not with the courts but with the legislature.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Dated: December 31, 1973.

Respectfully submitted,

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APPENDIX A

Statute Involved

The statutory provision involved is Section 659 of Title 18, United States Code.

> "Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property;"
>
> "To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of shipment shall be prima facie evidence of the place from which and to which such shipment was made. The removal of property from a pipeline system which extends interstate shall be prima facie evidence of the interstate character of the shipment of the property."

APPENDIX B

Opinions and Judgment Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 232, 233 & 234—September Term, 1973.

(Argued October 4, 1973 Decided November 8, 1973.)

Docket Nos. 73-1679, 73-1730 & 73-1731

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JAMES JEROME ASTOLAS, WILLIAM DALLAS BERMEL, DANIEL JAMES EDIN,

Defendants-Appellants.

Before:

MEDINA, FEINBERG and TIMBERS,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Western District of New York, John O. Henderson, Chief Judge.

James Jerome Astolas, William Dallas Bermel and Daniel James Eden appeal from a judgment convicting them of the theft of the contents of three tractor trucks and trailers of the value of more than $100 as part of

an interstate shipment in violation of 18 U.S.C., Sections 659 and 2, and of conspiracy in violation of 18 U.S.C., Section 371.
Affirmed.

Richard J. Arcara, Assistant United States Attorney, Western District of New York, Buffalo, New York, (John T. Elfvin, United States Attorney, Western District of New York, Buffalo, New York, on the brief), for Plaintiff-Appellee.

William B. Mahoney, Buffalo, New York, for Defendants-Appellants, James Jerome Astolas and William Dallas Bermel.

John P. McKenna, Buffalo, New York, for Defendant-Appellant, Daniel James Edin.

MEDINA, *Circuit Judge:*

This is an appeal from a judgment entered in the United States District Court for the Western District of New York, Chief Judge John O. Henderson presiding after a jury trial convicting each of the appellants of three counts of an indictment alleging that appellants stole certain trailers containing automotive supplies constituting interstate shipments, 18 U.S.C., Sections 659 and 2, and of one count alleging conspiracy, 18 U.S.C., Section 371. Appellant Astolas was sentenced to serve concurrent eight-year terms of imprisonment on each of the substantive counts and a five-year concurrent term on the conspiracy count. Bermel and Edin were given a concurrent five-year term of imprisonment on each of the four counts. Each appellant was fined $20,000.

Opinions and Judgment Below

We find it necessary to discuss only the legal questions arising out of appellants' contentions that as to two of the trailers interstate shipment had not commenced at the time appellants made off with the trailers and their contents, and that as to the other trailer interstate shipment had terminated.

I

The facts adduced at the trial by the Government to show the interstate character of the shipments were not controverted. Middle Atlantic Warehouse Distributors, Inc., the victim of the theft, is an automobile supplies wholesaler that owns a warehouse in Tonawanda, New York. In the course of its business, it purchases parts from manufacturers, generally located in the Midwest, warehouses them, and resells them to 70 customers, 65 of which are spread throughout 15 Northeastern states. Middle Atlantic employs its own drivers, and uses its own tractor-trailers to carry the parts from manufacturers to Tonawanda, and from Tonawanda to its customers.

On July 20, 1972, Middle Atlantic trailer 7105 was loaded with supplies from the Middle Atlantic warehouse. A bill of lading was prepared by the warehouse manager describing the contents of the shipment, its weight, together with routing directions to stops in Massachusetts, Connecticut, and Rhode Island. The doors of the trailer were closed and sealed with serially numbered metal strips inserted between the door and frame of the vehicle.

On Friday, July 21, 1972, Middle Atlantic similarly loaded trailer 7106 with supplies, sealed its doors, and prepared shipping documents.

The following day, Saturday, July 22, a day on which Middle Atlantic was not open for business, the manager returned to the warehouse, attached tractor trucks to trailers 7105 and 7106, and moved them from the loading dock to a Middle Atlantic parking lot adjacent to the warehouse. He then put the respective bills of lading on the consoles next to the drivers' seats of the tractors, checked the seals, and locked the tractors. Trailer 7105 was scheduled to depart on Sunday, July 23, and Trailer 7106 was scheduled to depart before the opening of business on Monday, July 24. The manager testified that nothing else had to be done to ready the vehicles for transit; they were merely awaiting their assigned drivers.

Trailer 7107 was driven on Friday, July 21, 1972, from the A & P Parts Company in Toledo, Ohio, to Middle Atlantic's warehouse in Tonawanda, arriving at 8:15 in the evening, after regular business hours. The driver, a Middle Atlaintic employee, backed his vehicle up to door 6 of the warehouse and left it there, tractor truck and trailer still connected. He deposited the bill of lading in a mail box, which had been placed for that purpose on a side door leading to the warehouse.

Trailers 7105, 7106 and 7107 and their attached tractors were stolen on Saturday night, July 22.

At the appellants' trial, Chief Judge Henderson gave the following instructions to the jury on the subject of whether the automobile supplies constituted interstate shipments:

> The interstate character of the property stolen is an essential element of this offense. The interstate character of a shipment commences at the time that the property is segregated for interstate commerce and

comes into possession of those who are assisting its course in interstate transportation, and continues until the property arrives at its destination and is there delivered, either by actual unloading or by being placed to be unloaded.

Thus, for example, as to Counts One and Two of the indictment [those relating to trailers 7105 and 7106], if you find beyond a reasonable doubt that Middle Atlantic Warehouse Distributors, Incorporated, had caused the goods in question to be placed in trailers at their loading dock; that the trailers had then been sealed; that tractors were then affixed to the trailers; that the tractor trailers were then moved to a point away from the loading dock and placed in the parking lot of Middle Atlantic Warehouse Distributors, Inc., and that bills of lading had been prepared and placed within the cabs of the tractors; then you may also find that the property in question constituted a shipment in interstate commerce.

In addition, if you find beyond a reasonable doubt that the tractor trailer involved in Count Three of the indictment [relating to trailer 7107], arrived at the yard of Middle Atlantic Distributors, Inc., from another state; you will recall this involved a shipment from Toledo, Ohio, into New York State, that upon arrival in that yard the tractor trailer was placed in the loading dock in a sealed condition; and that the bill of lading was placed in the mail slot of the terminal, then, you may also find that the property in question remained in interstate commerce at the time of the alleged theft.

Appellants noted an exception to these instructions.

Appellants claim that trailers 7105 and 7106 had not yet become interstate shipments at the time they were stolen, and that trailer 7107 had ceased to be an interstate shipment by the time it was stolen. They claim that the trial court erred in its instructions to the jury by giving over-

broad content to "interstate shipment," by giving disjunctive rather than conjunctive effect to the three phrases of the statute preceding the words "interstate shipment," and by restating the instructions in the terms of the testimony of Government witnesses. They make other claims for reversal on the subject of other exceptions to the charge and to various refusals to charge as requested.

We find no merit in any of these contentions.

II

Section 659

The indictments charged that appellants violated Section 659 of Title 18 of the U.S. Code:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motor-truck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; * * *.

The phrase most important to this appeal, "moving as or which are a part of or which constitute an interstate or foreign shipment," was the phrase chosen by Congress in 1913 when it first enacted the predecessor of Section 659. The legislative history of the 1913 bill sheds no light on the meaning of the phrase. The bill was reported to the Senate by the Judiciary Committee with the recommendation that it be passed, but without other comment. S. Rep.

1132, 62d Cong., 3d Sess. The floor debates reflect only an attempt to amend the bill to transmute it into a venue provision, defining a federal crime only if venue did not lie in any state because of the interstate character of the theft. The proposed amendment was rejected out of hand.[1]

Although the legislative history of the statute sheds no light on its purpose, this Court has repeatedly held, given the all-inclusive sweep of its terminology, that Section 659 is designed by the Congress to promote the flow of goods in interstate commerce, *United States v. Berger*, 338 F.2d 485 (2d Cir. 1964), *cert. denied*, 380 U.S. 923 (1965); *United States v. Thomas*, 396 F.2d 310 (2d Cir. 1968), and that the carrying out of this purpose is not to be hampered by technical legal conceptions. 338 F.2d, *supra*, at 487.

The scope of the phrase "moving as or which are a part of or which constitute an interstate or foreign shipment" is plainly to be inferred from the list of places from which theft is proscribed. These places include not only railroad cars and tractor-trailers and other modes of transportation, but any "station, station house, platform or depot * * *." It was intended that a theft from commerce could be committed before the goods were placed on board, and after they are taken off of a carrier; it is not required that a shipment be in motion.

The statute suggests three ways in which the commerce requirement can be met: the goods can be (1) moving as

[1] Subsequent to 1913, the statute was amended a number of times, modernizing its language and including new means of transportation within its scope. See 43 Stat. 729, Jan. 28, 1925; 47 Stat. 773, Jan. 21, 1933; 60 Stat. 656, July 24, 1946; 61 Stat. 52, April 16, 1947. The language "moving as or which are a part of or which constitute an interstate or foreign shipment" has never been altered.

an interstate shipment, (2) part of an interstate shipment, or (3) constituting an interstate shipment. The use of the conjunction "or" between the clauses suggests that the criteria are disjunctive rather than conjunctive. See *United States v. Gollin*, 176 F.2d 889, 893 (3d Cir.), *cert. denied*, 338 U.S. 848 (1949).

Under all three clauses, the determination that a shipment is interstate is essentially a practical one based on common sense and administered on an *ad hoc* basis. It depends on such indicia of interstate commerce as the relationship of consignee, consignor, and carrier, if they are separate entities, *United States v. Cousins*, 427 F.2d 382 (9th Cir. 1970), the physical location of the shipment when stolen, *United States v. Vilhotti*, 452 F.2d 1186 (2d Cir. 1971), *cert. denied*, 406 U.S. 947 (1972), whether the goods have been delivered to a carrier at the time of theft, *United States v. Fox*, 126 F.2d 237 (2d Cir. 1942), where there is no carrier, what steps the owner has taken to carry out an interstate shipment, *cf. Hughes Brothers Timber Co. v. Minnesota*, 272 U.S. 469, 475-76 (1926), and the certainty with which interstate shipment is contemplated, as evidenced by shipping documents. *Cf. United States v. Berger, supra*, 338 F.2d 485 (2d Cir. 1964), *cert. denied*, 380 U.S. 923 (1965).

III

Having stated the controlling legal principles applicable to this type of case, we turn to a brief discussion of the details of appellants' contentions.

A

The statute reads in the disjunctive, "or," and the indictment alleges in the conjunctive, "and." It is argued that this requires for conviction a finding that the stolen goods not only "constituted" an interstate shipment, but also that the goods were "moving as" and "were a part of" an interstate shipment. Chief Judge Henderson properly refused to instruct the jury to this effect. The main thrust of the case is whether or not we have here an interstate shipment. Chief Judge Henderson acted wisely and properly in refusing to be drawn away, or to have the jury's attention diverted from this basic concept. An indictment may charge alternate ways of violating a statute in the conjunctive, and a conviction under such an indictment will be sustained if the evidence justifies a finding that the statute was violated in any of the ways alleged. *United States v. Conti*, 361 F.2d 153 (2d Cir. 1966), *rev'd on other grounds*, 390 U.S. 204 (1968); *Joyce v. United States*, 454 F.2d 971 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972); *McGriff v. United States*, 408 F.2d 333 (9th Cir. 1969); *Rimerman v. United States*, 374 F.2d 251 (8th Cir.), *cert. denied*, 387 U.S. 931 (1967); *Smith v. United States*, 234 F.2d 385 (5th Cir. 1956).

In this case there was no common or contract carrier. Middle Atlantic was the shipper and the tractor trucks and trailers were owned by Middle Atlantic and operated by its employees. Appellants make much of this and call our attention to a variety of quotations from decisions in cases with a bewildering variety of fact situations involving carriers or the taxing powers of the States. It is settled law, however, that carriage of the property by the owner does not put the property outside of the protection of Section 659. *Winer v. United States*, 228 F.2d 944, 947 (6th Cir.), *cert. denied*, 351 U.S. 906 (1956); *United States v. Gollin*, *supra*, 176 F.2d 889 (3d Cir.), *cert. denied*, 338 U.S. 848 (1949); *Marifian v. United States*, 82 F.2d 628 (8th Cir.), *cert. denied*, 298 U.S. 686 (1936). If the consignor of the goods, in cases where no carrier is involved, takes steps that would normally be taken if a carrier were involved, and this is done with the intent to ship goods in interstate commerce, there is basis for a finding that the goods constitute an interstate shipment. *Cf. Hughes Brothers Timber Co. v. Minnesota*, *supra*, 272 U.S. 469, 475-76 (1926).

We are told that this is a case of first impression. Perhaps this is so. But, once it becomes clear that the same rule applies whether or not a separate common or contract carrier is involved, we think the result here is controlled by Judge Mulligan's ruling for this Court in *United States v. Vilhotti*, *supra*, 452 F.2d 1186 (2d Cir. 1971), *cert. denied*, 406 U.S. 947 (1972). In that case two trailers were loaded and made ready to depart just as were trailers 7105 and 7106 in this case. The goods were stolen before the trailers were moved from the place where they were parked. These

two trailers were in or near the premises of the Crown Drug Stores Distribution Center in Cranford, New Jersey, awaiting the arrival of the tractor trucks and the drivers who were to take the trailers to retail stores in Long Island, New York. According to footnote 1, page 1187 of *Vilhotti*, the placing of these loaded and sealed trailers in the place from which they were to be driven across state lines "constituted an effective delivery of the goods to the carrier, sufficient to render the goods part of interstate commerce as required by the statute."

While the facts of *Vilhotti* are not fully set forth in Judge Mulligan's opinion, an examination of the briefs indicates that the shipper had contracted with Paul's Trucking Company to provide tractors and drivers to transport the trailers to Long Island. This trucking company is the "carrier" referred to in the *Vilhotti* footnote. We think this holding clearly applies to a case such as the one before us where the loading, sealing and routing of the trailers were all completed prior to the arrival of the shipper's own drivers to drive the trailers away to their interstate destinations. And we also conclude that the same identical principles apply in reverse to the trailer from Ohio. *Chapman v. United States*, 151 F.2d 740 (8th Cir. 1945); *Murphy v. United States*, 133 F.2d 622 (6th Cir. 1943); *United States v. Cousins*, *supra*, 427 F.2d 382 (9th Cir. 1970).

We cannot agree with appellants' contention that the cases cited in Judge Mulligan's footnote in *Vilhotti* are not in point. The facts in *United States v. Gollin*, 166 F.2d 123 (3d Cir.), *cert. denied*, 333 U.S. 875 (1948), second appeal *United States v. Gollin*, *supra*, 176 F.2d 889 (3d Cir.), *cert. denied*, 338 U.S. 848 (1949), were strikingly sim-

ilar to those in the case before us. In *Gollin* 600 cases of beer were stolen from a truck that had been loaded and sealed and driven to a point on a public street in Newark, N.J. in front of Ballantine's brewery garage and two blocks from the loading platform. It was left there to await its previously assigned driver who was to take it to North Tarrytown, N.Y. The loader left the completed bill of lading with the truck keys at the garage to be picked up by the driver. Before the arrival of the driver the 600 cases of beer were stolen. The whole tenor of the opinions on both the first and on the second appeal indicated no doubt on the part of any of the judges that the 600 cases of beer constituted an interstate shipment. The first conviction was reversed because the trial judge after a review of the uncontroverted facts, as above stated, told the jury that as a matter of law the 600 cases of beer constituted an interstate shipment. This amounted to the direction of a verdict to convict, which is not permissible in criminal cases. On the second appeal, after a second conviction, the area of contention involved instructions by the trial judge that permitted conviction only if the jury found not only that the goods constituted an interstate shipment but also that they were moving in interstate commerce. After an explicit and unambiguous statement that the goods constituted an interstate shipment and that "Had the truck remained on the loading platform we would reach a similar conclusion" (*United States Gollin, supra*, 176 F.2d 889, at 893, *cert. denied*, 338 U.S. 848 (1949)), the Third Circuit affirmed the second conviction because the instructions were more favorable to the defendants than they were entitled to receive and hence not prejudicial.

Opinions and Judgment Below

We have already commented on *United States v. Berger, supra*, 338 F.2d 485 (2d Cir. 1964), *cert. denied*, 380 U.S. 923 (1965). *United States v. Cousins, supra*, 427 F.2d 382 (9th Cir. 1970) involves the same principle but refers to goods stolen from a railroad car placed on the siding of the consignee awaiting unloading.

Nor are we persuaded that our decision in *United States v. Fox, supra*, 126 F.2d 237 (2d Cir. 1942) gives any support to appellants' contentions. When the Court held "we are satisfied that at least as soon as the goods have finally left the shipper's possession and have come into the possession of any of those who are to forward them upon an interstate journey * * * they become a part of interstate commerce", the qualification "at least" must be taken to indicate that there are cases where an interstate shipment may be constituted before the goods are delivered to a carrier. This is such a case.

If it be true that the situation before us in this case is a novel one and that the state of the authorities is such as to leave a loophole through which thieves may safely emerge unscathed and unaffected by any federal criminal statute to the frustration of the obvious purpose of the Congress in the enactment of Section 659 to facilitate rather than to impede the movement of goods in interstate commerce, it is high time that the loophole be closed.

IV

The proofs give ample support to the verdict. The highjackers were caught red-handed as they drove the three tractor trucks and trailers away from the premises of Middle Atlantic. One of the appellants was promptly apprehended hiding in a nearby marsh.

With respect to trailers 7105 and 7106 the supplies were packaged and segregated and addressed to Middle Atlantic customers. These supplies were loaded into the trailers. Bills of lading showing out-of-state routings were completed. The trailers were sealed. Unless the statute is to be read as requiring more than proof that the goods constituted an interstate shipment this was enough.

With respect to trailer 7107, the goods were still sealed in the body of the trailer. They were segregated from all other Middle Atlantic property. They had been neither examined nor accepted. A finding that the goods still constituted an interstate shipment was proper.

Affirmed.

APPENDIX C

Order Extending Time to File Petition for Writ of Certiorari

SUPREME COURT OF THE UNITED STATES

No. A-521.

JAMES JEROME ASTALOS and
WILLIAM DALLAS BERMEL,

Petitioners,

v.

UNITED STATES.

Upon consideration of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 7, 1974.

/s/ THURGOOD MARSHALL,
Associate Justice of the Supreme Court of the United States.

Dated this 27th day of November, 1973.

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MAR 28 1974
MICHAEL RODAK, JR., CLERK

Nos. 73-1057 and 73-1058

In the Supreme Court of the United States

OCTOBER TERM, 1973

DANIEL JAMES EDIN, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES JEROME ASTALOS AND WILLIAM DALLAS BERMEL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1057

DANIEL JAMES EDIN, PETITIONER

v.

UNITED STATES OF AMERICA

NO. 73-1058

JAMES JEROME ASTALOS AND WILLIAM DALLAS BERMEL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the evidence was insufficient to show that the goods they were convicted of stealing were taken from interstate shipments.

Following a jury trial in the United States District Court for the Western District of New York, petitioners were convicted on three counts of interstate theft and one count of conspiracy, in violation of 18 U.S.C. 2, 659, and 371. Petitioner Astalos was sentenced to imprisonment for three concurrent terms of eight years

on the substantive counts and to a concurrent term of five years on the conspiracy count. Petitioners Bermel and Edin were sentenced to imprisonment for concurrent terms of five years on all counts. Each petitioner was also fined $20,000. The court of appeals affirmed in a comprehensive opinion (Pet. App. B).

Middle Atlantic Warehouse Distributors, Inc., is an automobile supplies wholesaler operating out of a warehouse in Tonawanda, New York. It employs its own drivers and uses its own tractor-trailers to carry automotive parts from manufacturers in the Midwest to its warehouse, and from there to its 70 customers, 65 of whom are located throughout 13 Northeastern states (Tr. 99-101, 103). Two trailers, numbers 7105 and 7106, were loaded with supplies from the Middle Atlantic warehouse and sealed on July 20 and 21, 1972, respectively (Tr. 174, 176). Bills of lading were prepared by the warehouse manager indicating the contents of the shipment and routing directions to stops in Massachusetts, Connecticut, and Rhode Island (Tr. 173-177). At the close of business on Friday, July 21, 1972, both trailers remained at the loading dock, sealed but not connected to tractors (Tr. 178).

Later that evening (about 8:15 p.m.), a driver pulling trailer number 7107 arrived with a load of parts from the A & P Parts Company in Toledo, Ohio (Tr. 153-154). He parked the tractor and trailer, which was sealed shut, at the loading dock and deposited the bill of lading in the mailbox provided for arrivals after working hours (Tr. 155-157). The trailer was scheduled for unloading during normal business hours on Monday morning, July 24, 1972 (Tr. 184).

The next morning, Saturday, July 22, 1972, the warehouse manager came to work for a couple of hours, although Middle Atlantic was not open for business

(Tr. 179). He attached tractors to trailers 7105 and 7106, moved them away from the loading ramp into a parking lot adjacent to the warehouse, checked the tires, seals, and locks, placed the bills of lading on the consoles in the tractor cabs, and left them ready for their scheduled departure on Sunday evening and Monday morning, July 23 and 24, before the opening of business (Tr. 180-183).

Pursuant to petitioners' plan (Tr. 506-510), on Saturday, July 22, 1972, at about 10:30 p.m., petitioner Edin, one Albert Pries, and one David Gilmore (an FBI informant) went to the Middle Atlantic warehouse and, with keys provided to them by petitioner Astalos, started the tractors and drove out of the warehouse area with trailers 7105 and 7106 (which were in the parking lot awaiting departure) and 7107 (which was at the loading dock waiting to be opened and unloaded). The trucks were immediately stopped by FBI agents, who had set up roadblocks a short distance from the warehouse (Tr. 510-528).

Petitioners' contentions--that trailers 7105 and 7106 had not yet become interstate shipments at the time they were stolen, that trailer 7107 had ceased to be an interstate shipment at the time it was stolen, and that the phrase "moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property," as used in 18 U.S.C. 659, should be interpreted in the conjunctive rather than the disjunctive--were thoroughly considered and properly rejected by the court of appeals (Pet. App. B), upon whose opinion we rely.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.